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No. 450

In the Supreme Court of the United States

OCTOBER TERM, 1968

COASTWISE PACKET COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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No. 459

COASTWISE PACKET COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 20-27) is reported at 277 F. Supp. 920. The opinion of the court of appeals (Pet. App. 28-33) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1968. The petition for a writ of certio-

rari was filed on August 29, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States is liable under the Tort Claims Act for the loss of business resulting from the Coast Guard's allegedly negligent delay in deciding to issue a certificate of inspection to petitioner's cruising vessel.

STATUTES INVOLVED

The Federal Tort Claims Act, 28 U.S.C. 2680, provides in relevant part:

> The provisions of [this Act] shall not apply to—
>
> (a) Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

46 U.S.C. 390a provides in relevant part:

> (a) The Secretary shall, at least once every three years, cause to be inspected each passenger-carrying vessel, and shall satisfy himself that every such vessel * * * is in a condition to warrant the belief that it may be used, operated, and navigated with safety to life in the proposed service * * *.

46 U.S.C. 390c provides in relevant part:

> (a) No passenger-carrying vessel shall be operated or navigated until a certificate of inspection * * * has been issued to the vessel * * *.

STATEMENT

Petitioner is the owner of a sailing vessel called the SHENANDOAH, which was launched in February 1964 and intended for use in "windjammer" cruises (R. 4, 8). Under a law which went into effect on June 1, 1958, such vessels require Coast Guard certification before they may carry paying passengers. 46 U.S.C. 390 *et seq.*[1] Petitioner first applied for a certificate of inspection in July 1963, while the vessel was under construction (R. 164). The issue which delayed certification was the vessel's stability. Coast Guard regulations do not specify precise criteria for the stability of sailing vessels, which are considered to be "special cases." 46 C.F.R. 74.10-11.

Because the SHENANDOAH was based on the plans for a nineteenth-century revenue cutter called the JOE LANE (R. 5), and because the Coast Guard had previously certified another sailing vessel called the MARY DAY (R. 6), petitioner's architects apparently thought that they would encounter no problem on the question of stability. However, the Coast Guard officers responsible for initial action on petitioner's application

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[1] Until 1958, the law requiring Coast Guard inspection and certification of commercial vessels did not extend to sailing vessels of less than 700 gross tons. In 1956, after 14 people died in the foundering of a sailing vessel carrying passengers for hire in Chesapeake Bay, Congress removed the tonnage restriction, effective June 1, 1958. See S. Rep. No. 1872, 84th Cong. 2d Sess., at pp. 2-3, 5. Vessels built before June 1, 1958, were also subject to the law, but under "grandfather clauses" in the regulations were not subject to as stringent requirements as vessels built after that date. 46 C.F.R. 70.05-15(c), 177.01-1(a), 181.01-1(b), 182.01-1(a), and 183.01-1(a).

took the view that the SHENANDOAH was a "unique vessel" (R. 146), differing in design from the MARY DAY (R. 118) and in function from the JOE LANE.[2] Accordingly, these officers agreed that their "tentative approach" to evaluating the plans of the SHENANDOAH would be to require a 90-degree range of stability (*i.e.*, ability to right herself from a knockdown). (R. 19, 50-51.) This "tentative approach" was not communicated to petitioner because the responsible Coast Guard personnel had not received, in their view, sufficient information regarding the plans of the vessel to determine whether this approach was relevant (R. 94, 124). However, petitioner was told that the vessel must have "adequate stability" and that, when the vessel was completed, a stability test under Coast Guard supervision would be required (R. 24).

The Coast Guard performed stability tests in June 1964, which demonstrated a stability range of only 57 degrees. On July 7, 1964, it informed petitioner that this was unsatisfactory, since a 90-degree range would be required. (R. 34.) Following a conference, the Coast Guard ruled—on July 20, 1964—that the 90-degree standard would not be required if other

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[2] One of the Coast Guard officers involved later stated: "The JOE LANE was an extremely fast, shoal draft schooner designed for law enforcement work where she, of necessity, carried a great amount of sail for speed and had a shallow hull to allow work in restricted coastal waters. The JOE LANE had a crew of about 18 trained seamen to control the large and complex rig. SHENANDOAH, on the other hand, was intended to have a crew of about 8 and to carry about 28 untrained passengers in commercial service on ocean waters." (Appendix to Brief for Defendant-Appellee, at p. 3a.)

conditions were met (R. 172). Since these other conditions were not met, the ruling of inadequate stability was confirmed (*ibid.*).

Petitioner then pursued an administrative appeal. On February 24, 1965, the Commandant of the Coast Guard ruled that the vessel was sufficiently stable to be certified, provided that it observed certain restrictions on the use and number of its sails, the amount and location of ballast, and other matters. Approval was also restricted to use of the vessel on lakes, bays and sounds. (R. 47-48.)[3]

Petitioner brought this action under the Tort Claims Act for the loss of business during the summer season of 1964. The district court granted summary judgment for the government (Pet. App. 20-27), on the ground that the action was barred by the exceptions in the Tort Claims Act for claims arising out of "misrepresentation," "interference with contract rights," and "the exercise or performance or the failure to exercise or perform a discretionary function or duty." 28 U.S.C. 2680(a), (h). The court of appeals ruled that the exceptions for misrepresentation and interference with contract rights were not controlling,[4] but affirmed on the ground that the action

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[3] The initial application for certification was for service in sounds and bays (R. 164). However, the application was later extended to include ocean service (R. 165).

[4] The court agreed that certain portions of the complaint—alleging that petitioner was misled as to the applicable standards and that the vessel's reputation was hurt by the attendant publicity—fell by virtue of the misrepresentation exception. However, it concluded that the district court erred in relying on that exception as a basis for dismissing the entire complaint.

was barred by the "discretionary function" exception (Pet. App. 28-33).

ARGUMENT

The decision below is correct; the legislative history of the "discretionary function" exception to the Tort Claims Act demonstrates that one of its primary purposes was to preclude use of tort actions as a means of testing the allegedly negligent exercise of regulatory power. There is no conflict of decisions; we are aware of no case holding that a business operating in a regulated area may recover under the Tort Claims Act for the delays and expense incident to obtaining regulatory approval required by law. Accordingly, there is no occasion for further review.

1. The Secretary of the Treasury is required by statute to cause to be inspected each commercial vessel carrying more than six passengers, and to "satisfy himself that every such vessel * * * is in a condition to warrant the belief that it may be used, operated, and navigated with safety to life in the proposed service * * *." 46 U.S.C. 390a. In implementing this statute on behalf of the Secretary, the Coast Guard is performing the function of a regulatory agency, acting in a capacity similar to that of the Food and Drug Administration in approving a new drug for interstate shipment, the Federal Aviation Agency in certificating the airworthiness of an aircraft, or the Securities and Exchange Commission in permitting a registration statement to become effective. In all such cases, delay on the part of the regulatory agency may damage the business seeking regulatory approval.

Neverthless, this is simply one of the costs of doing business in a regulated area. A primary purpose of the "discretionary function" exception was to cover precisely this type of case. The legislative committee reports explain:

> This is a highly important exception, intended to preclude * * * application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. To take another example, claims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted. The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion. * * *

H. Rep. No. 2245, 77th Cong. 2d Sess., p. 10; S. Rep. No. 1196, 77th Cong. 2d Sess., p. 7; H. Rep. No. 1287, 79th Cong. 1st Sess., pp. 5-6. See *Dalehite* v. *United States*, 346 U.S. 15, 26-30.[5]

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[5] The quoted passage goes on to state that "the common-law torts of employees of regulatory agencies would be included" within the bill, citing as an example "an automobile collision caused by the negligence of an employee" of a regulatory agency. Petitioner argues (Pet. 9, 11) that the "professional error" of the Coast Guard officers in refusing certification is a "common-law tort" of the type which the committee reports stated would not be within the discretionary function exception. This argument, however, would sub-

2. Petitioner asserts a conflict with cases in which the United States has been held liable under the Tort Claims Act for the negligence of an air traffic controller (*e.g.*, *United States* v. *Union Trust Co.*, 350 U.S. 907; *Ingham* v. *Eastern Airlines, Inc.*, 373 F. 2d 227 (C.A. 2), certiorari denied, 389 U.S. 931; *Hartz* v. *United States*, 387 F. 2d 870 (C.A. 5); cf. *United Air Lines, Inc.* v. *Wiener*, 335 F. 2d 379 (C.A. 9)). Such cases, however, did not involve the formulation of general policy to be applied to a category of situations; by contrast, as the court of appeals pointed out (Pet. App. 30-31), the damage here resulted because the Coast Guard was "groping for a standard" with which to assess petitioner's vessel. Moreover, those cases involved situations in which the government's action endangered the safety of life and property; while, on the other hand, the complaint here is that the Coast Guard was overly cautious, rather than insufficiently cautious, in attempting to protect the safety of potential passengers on the SHENANDOAH. As the court of appeals observed (Pet. App. 32-33), "[o]ne can well understand why Congress would not want to place a regulatory agency in the dilemma of exposing the government to tort suits by disappointed applicants if the agency is over-cautious or, in the alternative, by injured third parties if it is not cautious enough."

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stantially vitiate the discretionary function exception, since it would permit application of the Tort Claims Act to any performance of a regulatory function involving the exercise of professional judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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